Supreme Court, U.S.
FILED
DEC 5 1996
CLERK

No. 96-711

In The

Supreme Court of the United States

October Term, 1996

LOUIS GINBERG,

Petitioner,

v.

LASZLO N. TAUBER,

Respondent.

On Petition For Writ Of Certiorari To The District Of Columbia Court Of Appeals

BRIEF IN OPPOSITION

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20 pp

QUESTIONS PRESENTED

In the opinion of counsel for Respondent, the following questions would be presented by the record and decisions in this case if this Court were to grant review:

1. Whether Petitioner preserved his claim to a jury trial when he deliberately refused the trial court's request to explain, in light of prior decisions by the District of Columbia Court of Appeals, why he was entitled to a jury trial.

2. Whether the District of Columbia Court of Appeals erred in its determination that Petitioner had based his claim for recovery on quantum meruit rather than on any agreement with Respondent regarding the fee or the basis for determining a fee.

3. Whether Petitioner could have been harmed by any constitutional error where (a) the fee awarded was the highest fee which could have been awarded upon the evidence and the local-law standard for award of attorneys' fees and (b) any vacation of that award would result in mandated arbitration rather than trial by jury.

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STATEMENT OF THE CASE

Two significant facts are omitted from the statement of the case by Mr. Ginberg. *First*, the case below was commenced, pretried, tried, argued and decided on factual and legal theories completely different from those asserted in the petition. *Second*, Mr. Ginberg's jury demand was struck not because of any theoretical legal rationale but because Mr. Ginberg deliberately refused to follow an order of the trial court to brief his position that he was entitled to trial by jury.

In his complaint against Dr. Tauber, filed in the Superior Court of the District of Columbia, Mr. Ginberg asserted a claim for a fee for having represented Dr. Tauber in that court (and on appeal to the District of Columbia Court of Appeals). The fee claimed by Mr. Ginberg was $3,750,000 – exactly one-third of the value of the judgment obtained by Mr. Ginberg in representing Dr. Tauber (and about 40% of the amount for which Dr. Tauber settled the judgment). (Pet. App. 4, 5.)

The complaint was expressly premised upon an oral hiring of Mr. Ginberg by Dr. Tauber to provide legal services and, therefore, the obligation of Dr. Tauber to pay "the fair and reasonable value of plaintiff's services." There was no claim that the parties had ever agreed upon a value for those services or upon a basis for determining their value.[1]

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[1] In the alternative, Mr. Ginberg's complaint asked for a one-third contingency fee. At trial, however, he specifically testified that he was "*not* claiming a contingency fee in this case" (Trial Tr. 210, emphasis added) and represented that "he

Thereafter, Mr. Ginberg successfully resisted discovery of fees he had charged in other cases by contending that the fee due him was to be determined not by reference to any standard fees or hourly rates he may have charged to others but, rather, on the principles of quantum meruit. (R. 87-88.) Under District of Columbia law, the principles of quantum meruit apply only to an obligation implied in law in the absence of agreement. *Chase v. Gilbert*, 499 A.2d 1203, 1207 (D.C. 1985).

At the conclusion of discovery, in their joint pretrial statement, the parties stipulated to the disputed issue, "What is a reasonable fee for Plaintiff's services in the litigation against the District of Columbia?" The parties also stated their disagreement about the applicable basis for determining what constituted a "reasonable fee." Mr. Ginberg contended that the reasonableness of his claimed fee should be determined under Rule 1.5(a) of the District of Columbia Rules of Professional Conduct; *i.e.*, that the issue to be tried was whether the fee which Mr. Ginberg asserted was reasonable. Dr. Tauber asserted that a reasonable fee in this matter should be determined "from the ground up" through the use of the "lodestar" method.

Since both parties agreed that some fee was due, the trial court entered a partial summary judgment for Mr. Ginberg (on liability), with the amount of the fee to be determined by trial. It was at this stage, as Mr. Ginberg correctly recites in his petition, that the trial court denied his demand for a jury trial. Mr. Ginberg neglects to

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was *not* contending Tauber had agreed to pay a percentage of recovery. . . . " (Pet. App. 6, emphasis added; *see* Trial Tr. 22.)

explain why that happened, however. The trial court, *sua sponte* and on the basis of precedent in that court,[2] issued an order on December 10, 1991, that

> *unless* a motion for reconsideration supported by authority to the contrary is filed by [Ginberg] no later than January 10, 1992, [Ginberg's] demand for a jury trial *shall be* struck from the record. . . . [Pet. App. 2, emphasis added.]

Mr. Ginberg deliberately (a "tactical decision" as he later described it) filed nothing, and his demand was struck.

After the thirty-day deadline imposed by the trial court, Mr. Ginberg filed (and briefed) a petition for writ of mandamus in the court of appeals, asking that his jury demand be reinstated. That court denied the petition. (Pet. App. 2.)

More than a year later, Mr. Ginberg (by then represented by new counsel) moved for reconsideration of the order striking his jury demand. (*Id.*) The trial court held that Mr. Ginberg had waived any right to jury trial by failing to follow the briefing requirement of the prior order and that the denial of the writ of mandamus was the law of the case.[3]

At trial, Mr. Ginberg admitted that, during the more than two years he took to prepare to file his complaint against the District of Columbia on behalf of Dr. Tauber,

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[2] *Kudon v. f.m.e. Corp.*, 547 A.2d 976 (D.C. 1988) (claim for attorneys' fees under contractual fee-shifting provision not subject to trial by jury).

[3] The court of appeals declined to decide the correctness of either ground of decision by the trial court. (Pet. App. 3, n.2.)

he never communicated with Dr. Tauber about the basis for the fee he would charge in the representation. (Pet. App. 3.) He also admitted that he never communicated to Dr. Tauber his subjective understanding of how he expected to be compensated for the representation. (*Id.* at 5.) Indeed, he expressly testified that he was unaware of his professional responsibility to make the terms of his fee clear to his client at the beginning of his representation. (*Id.*)

Mr. Ginberg gave evidence at trial of other dealings with Dr. Tauber involving "multi-million dollar" real estate transactions and multi-year litigations involving millions of dollars for which, at the end of the representation, Mr. Ginberg had charged fees ranging from $1,000 to $60,000. (*Id.* at 6.) Both the trial court and the court of appeals held that this "course of dealing" "provided no guidance in determining a reasonable fee for the [instant] litigation." (*Id.* at 8, 18.) Mr. Ginberg also testified that, after the litigation had been concluded and settled, Dr. Tauber responded "fine" to a suggestion that Mr. Ginberg would charge Dr. Tauber a result-based fee for his services. (Pet. App. 4-5, 11 n.6.) Mr. Ginberg, however, specifically eschewed reliance upon that conversation as the basis for any fee agreement.[4]

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[4] Responding to an inquiry by the trial court during closing argument, counsel for Mr. Ginberg acknowledged: "I don't think it [the conversation] has all that much significance. I think even though Dr. Tauber said I agree to pay you a third [sic], he is not bound by that." (Trial Tr. 571.) Under the law of the District of Columbia governing post-representation agreements, Mr. Ginberg had no choice in the matter. *See Spilker v. Hankin*, 88 U.S. App. D.C. 206, 210, 188 F.2d 35, 39 (1951) (fee agreements

At the conclusion of the evidence, the trial court held that the case could not have gone to the jury because

> the only evidence really here of the quantum meruit value is what was presented by the defense, so it's hard to see how a jury could have – could possibly have resulted in any more favorable verdict for the plaintiff in this case. [Pet. App. 8.]

The court of appeals read the record of the proceedings both in the trial court and on appeal as one in which "Ginberg maintains . . . that he was entitled to a quantum meruit recovery for the 'reasonable value' of his services . . . " (Pet. App. 6), a record which demonstrated beyond any question that Ginberg had no fee agreement with his client and had failed in his professional responsibility to communicate to his client the basis of the fee to be charged. (*Id.* at 17-18.)

The court of appeals affirmed the decision of the trial court, holding that an attorney is not entitled to a jury trial upon the amount of his fee where, as in this case, there was neither any agreement between the parties as to how the fee would be determined nor any compliance by the attorney with his professional obligation to have made clear to the client the basis for his fee at the outset of the representation. (*Id.* at 10.) The court of appeals also held that the proper method for determining a reasonable

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entered into long after commencement of attorney-client relationship are "attended by a presumption of invalidity and overreaching"); *Pete v. United Mine Workers of Am. Welfare & Retirement Fund of 1950*, 171 U.S. App. D.C. 1, 17, 517 F.2d 1275, 1291 (1975, *en banc*) (invalidation of contingency fee agreements solicited after entry of judgment for liability).

fee in such circumstances is the "lodestar" method. (*Id.* at 16-19.)

During the pendency of the appeal, the court of appeals adopted Rule XIII of the District of Columbia Bar Rules (set forth in the appendix hereto), providing that an attorney "subject to the disciplinary jurisdiction of [the District of Columbia Court of Appeals] shall be deemed to have agreed to arbitrate disputes over fees for legal services . . . when such arbitration is requested by a present or former client. . . . "

REASONS THE PETITION SHOULD NOT BE GRANTED

The petition should not be granted because neither of the "questions presented" by the petition is based on the record below and because the actual decisions of the courts below are neither contested by the petition nor contrary to established jurisprudence.

I. The Questions Posed By The Petition Are Not Presented By The Record

The two "questions presented," as posed by the petition, have the same factual predicate: that there was a triable issue regarding the "existence of a fee agreement and its terms." That predicate, were it correct, would suggest that the courts below violated a broad reading of *Simler v. Conner*, 372 U.S. 221 (1963) (factual dispute as to existence and validity of a fee agreement is a legal issue) if not its precise holding (client entitled to trial by jury on

client's claim that fee agreement was procured by duress).

The predicate, however, is false. Mr. Ginberg filed his complaint not upon a fee agreement but for the reasonable value of services provided without a fee agreement. In other words, under District of Columbia law, Mr. Ginberg sued for quantum meruit recovery. *Chase v. Gilbert, supra.* He confirmed this expressly in pretrial discovery motions, and he stipulated to a limited number of issues to be tried. None of those issues even suggested the question of the "existence of a fee agreement and its terms." Rather, the only issues were what is a "reasonable fee" and what criteria would be used to measure it.

Not surprisingly, the trial court held that no jury would "have had the option to find any sort of contingency or value-based fee" (Pet. App. 8), and the court of appeals read the record as presenting *only* the issue of quantum meruit recovery where there was no fee agreement. (*Id.* at 6.)

Certiorari is not warranted where the only "questions presented" would be presented only by recasting the record to reflect decisions which neither of the courts below either made or thought they were making. *See Duncan v. Tennessee,* 405 U.S. 127 (1972) (dismissal of writ where, after briefing and oral argument, it appeared that state court decision was dependent upon non-constitutional interpretations of state law). Indeed, the court of appeals specifically held that, *had* there been a genuine issue of the "existence of a fee agreement and its terms," then that issue *would have been* triable to a jury. (Pet. App. 15-16.) Its decision was only that where, "as here, there is

no agreement concerning how the amount of fees is to be calculated," the trial court determines the amount of the fee. (*Id.* at 16, emphasis added.)

Mr. Ginberg does not challenge the ruling that quantum meruit calculations of attorneys' fees are a function of the trial court. Rather, he asserts only that the trial court and the court of appeals should have viewed the record before it as something other than quantum meruit, notwithstanding his pleadings, motions, pretrial stipulations, and trial positions.

The presumption against granting certiorari where the asserted error "consists of erroneous factual findings or the misapplication of a properly stated rule of law" (SUP. CT. R. 10) is doubly applicable here. First, the Court would not even reach the asserted error unless it first found that the trial court and court of appeals made erroneous findings regarding the state of the record before them. Second, the asserted error it would then reach would still be but a "misapplication of a properly stated rule of law" to an assertedly misperceived record.

If the Court were to review the record in this case and determine that, indeed, Mr. Ginberg had commenced, pretried, tried and argued his case below other than on a theory of quantum meruit, the "questions presented" by Mr. Ginberg would still not be presented to this Court. Rather, the Court would also have to assume that the court of appeals would have (a) *reached* the constitutional issues which (under that reading of the record) directly implicated *Simler v. Conner* rather than deciding the case

(for example) on the basis of waiver[5] or harmless error[6] or (because of the mandatory fee-arbitration rule) mootness and (b) *decided* the constitutional issue in a manner which that court expressly said it would not do. Neither assumption is warranted, nor does the record in this case warrant a stretch to grasp a constitutional issue not decided below.

Finally, were this Court to grant review of issues not actually decided below, the issues then before the court would include not only whether those issues are actually presented by the record (Respondent's Question 2) but, as well, whether Mr. Ginberg preserved those issues (Question 1) or would be harmed by any error in the decisions below (Question 3).

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[5] *See, e.g., Sewell v. Jefferson County Fiscal Court*, 963 F.2d 461, 464-66 (6th Cir. 1988) (plaintiff held to have waived jury demand by failing to make a timely objection to an order setting the case for bench trial).

[6] The courts below have already held that the award to Mr. Ginberg was the highest award that could have been made upon the evidence at trial. *See, e.g., In re N-500L Cases*, 691 F.2d 15, 25 (1st Cir. 1982) (application of harmless error rule to jury trial demand).

II. The Decision Below Presents No Conflict With The Decisions Of This Court, Of A United States Court Of Appeals, Or Of Another State Court Of Last Resort.

The decision actually rendered by the District of Columbia Court of Appeals is not in conflict with any decision of this Court, of a United States court of appeals, or of any state court of last resort.

The decision of the court of appeals is expressly limited to those situations in which one of its lawyers, regulated by the District of Columbia Bar (an arm of that court), has violated a rule of professional responsibility by failing to make clear to his client, at the outset of the representation, the basis of the fee to be charged. It is limited to those situations in which, rather than a dispute about whether there is a fee agreement or which of several fee agreements might control, the record is abundantly clear that there was no agreement at all except the agreement implied by law to pay a "reasonable fee" for services rendered.

As the court of appeals noted, the question presented was

> whether an attorney who has no agreement with his client concerning the amount of the fee to be paid, who sues the client to recover fees under a quantum meruit theory, is entitled to a jury trial. [Pet. App. 10.]

These circumstances were express limitations upon the court's holding:

> We hold that where it is undisputed that the client owes the attorney some fee for his legal

> representation, but there is no agreement concerning how the amount will be determined and the attorney has not informed the client of the basis of his fee, the trial court, not the jury, determines the amount of fee to be paid. [*Id.*]

Mr. Ginberg asserts that this holding is contrary to the holding of this Court in *Simler v. Conner*, but the court of appeals accurately distinguished the holding in that case from the decision it made in the instant case. As the court of appeals noted, the question in *Simler v. Conner* was which of two competing fee agreements would be enforced, the contingency-fee agreement obtained by the lawyer under what the client claimed was duress or the original fee agreement between the lawyer and the client. Here, to the contrary, neither Mr. Ginberg nor Dr. Tauber ever claimed that there was any fee agreement at all. Their dispute was not about which of various competing versions of the facts was true but, rather, which of two competing versions of the law ought to be applied to the fact that there was no agreement.

Dr. Tauber contended for a ruling that the "lodestar" formula ought to be applied to determine the "reasonable fee" due to Mr. Ginberg, and Mr. Ginberg contended for the application of the more amorphous standards of Rule 1.5(a) of the District of Columbia Rules of Professional Conduct. Both the trial court and the court of appeals decided that question in favor of the "lodestar" approach – just as this Court has, in analogous situations, held the "lodestar" approach applicable to the determination of a "reasonable fee." *See, e.g., Pennsylvania v. Delaware Valley Citizens' Council for Clean Air*, 478 U.S. 546 (1986); *Blum v. Stenson*, 465 U.S. 886 (1984).

Mr. Ginberg does not challenge the "lodestar" approach *per se*. Nor has he ever argued that the trial court erred in its determination that the "lodestar" award was the highest "lodestar" award that any jury could have made based upon the evidence in the case. Rather, the real gist of Mr. Ginberg's petition is that the courts below ought to have let the jury decide what rule of decision should be applied to the case – that the court ought to have let the jury decide whether to apply the "lodestar" method or the criteria of Rule 1.5 in a case in which the lawyer has failed in his ethical obligation to make the basis of his fee clear from the outset of the representation.

The decision about which *standards* ought to apply to a given factual situation is a question of law, not a question of fact. That, plainly, is the prerogative of the courts, not a jury.[7]

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[7] As a matter of policy, a lawyer who seeks a result-based fee at the conclusion of the representation, without having obtained the agreement of his client to a result-based fee at the beginning of the representation, poses special problems for the administration of justice. An unscrupulous attorney might, for example, deliberately not disclose an intended basis for calculation of his fee until the end of his representation so as to formulate the calculation method to fit the result achieved – a result-based method for success, an hourly-rate-based method for a less favorable outcome. For that very reason, the courts of the District of Columbia have always held that fee contracts entered into long after the attorney-client relationship has commenced are subject to the "close scrutiny of the court," are "attended by a presumption of invalidity and overreaching," and result in a view of the client as, in essence, a ward of the court. *Spilker v. Hankin, supra; Pete v. United Mine Workers of Am. Welfare & Retirement Fund of 1950, supra.* This close scrutiny by

Either expressly or by implication, every court which has looked at the issue has held that the choice of method for determining a "reasonable fee" is either a matter of law or a matter for the exercise of discretion by the trial court – *not* a matter to be decided by the trier of fact and reviewed only if clearly erroneous. This Court did so implicitly in adopting the "lodestar" standard for fee-shifting cases. The United States Court of Appeals for the District of Columbia Circuit did so implicitly when it adopted the "lodestar" method in fee-shifting cases and the percentage-of-recovery method in common fund cases. *Copeland v. Marshall*, 641 F.2d 880 (D.C. Cir. 1980, *en banc*) (lodestar); *Swedish Hospital Corp. v. Shalala*, 1 F.3d 1261 (D.C. Cir. 1993) (percentage of recovery). The Third Circuit Court of Appeals did so explicitly in *Student Public Interest Research Group v. AT&T Bell Laboratories*, 842 F.2d 1436, 1442 & n.3 (3rd Cir. 1988). And Mr. Ginberg has not suggested (either in his petition or in any of the proceedings below) that any court has ever held (or even intimated) otherwise.

Thus, even the decisions actually made by the court of appeals, which Mr. Ginberg challenges only obliquely (if at all), present no issue worthy of review by this Court.

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the courts has its genesis in the "inherent power [of the courts] over members of the legal profession." Preamble, District of Columbia Bar Rules.

CONCLUSION

For each of the foregoing reasons, Respondent requests that the petition be denied.

Respectfully submitted,

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APPENDIX

Rule XIII. Arbitration.

(a) An attorney subject to the disciplinary jurisdiction of this Court shall be deemed to have agreed to arbitrate disputes over fees for legal services and disbursements related thereto when such arbitration is requested by a present or former client, if such client was a resident of the District of Columbia when the services of the attorney were engaged, or if a substantial portion of the services were performed by the attorney in the District of Columbia, or if the services included representation before a District of Columbia court or a District of Columbia government agency.

(b) The arbitration provided under this rule shall be final and binding on the parties according to applicable law, and shall be enforceable in the Superior Court and in any other court having jurisdiction. Unless the attorney and client agree otherwise, the arbitration shall be before the Attorney-Client Arbitration Board of the District of Columbia Bar, and shall be pursuant to such reasonable rules and regulations (including those relating to fees for arbitration services) as may be promulgated from time to time by the District of Columbia Bar and the Attorney-Client Arbitration Board. (Added, Nov. 10, 1994, effective Jan. 1, 1995.)